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No. ~~97-542~~

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

WILLIAM SILVA,

Petitioner,

vs.

JAY RAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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9 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

FEDERAL CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 3

QUALIFIED IMMUNITY DOES NOT EXTEND TO STATE OR LOCAL OFFICIALS WHO SEIZE CHILDREN WITHOUT A PRIOR COURT ORDER AND WITHOUT ANY EVIDENCE THAT THE CHILDREN ARE IN IMMINENT DANGER OF HARM 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Behrens v. Peletier, 516 U.S. ___, 116 S.Ct. 834, 113 L.Ed.2d 773 (1996) 4

Doe v. Louisiana, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994) 4

Foy v. Holston, 94 F.3d 1528 (11th Cir. 1996) 4, 5

Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988) 4, 5

STATUTES

28 U.S.C. Section 1254 1

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Jay Ram, respectfully prays that the Petition for Writ of Certiorari filed herein in behalf of William Silva be denied.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Hawaii was filed on July 25, 1994, and is reprinted in the Appendix to the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Ninth Circuit dated July 2, 1997, is reported at 118 F.3d 1306 and is reprinted in the Appendix to the Petition for Writ of Certiorari along with the denial of Petitioner Silva's request for rehearing and suggestion for rehearing en banc, dated August 14, 1997.

STATEMENT OF JURISDICTION

Respondent concurs that the Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. Section 1254.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

All of the relevant provisions are cited and have been accurately reproduced in the Petition for Writ of Certiorari.

STATEMENT

In January, 1992, it was reported that Respondent Jay Ram had sexually abused a minor, Z.D., during a weekend visit by Z.D. to Ram's foster home. After Z.D.'s allegations were investigated by both the State of Hawaii's Child Protective Service ["CPS"] and the Hawaii County Police Department it was determined that Z.D. was unreliable and probably untruthful, and the investigations were then suspended or closed. In September 1992, CPS was induced by apparent political pressures to reopen the case and conduct a second inquiry by a neutral investigator who had not been involved in the first investigation. The second CPS investigation – in which all of Ram's children were interviewed – also concluded with findings that the credibility of Z.D. was suspect and that there was "no conclusive evidence" or even "any strong indication" that sexual abuse had occurred.

Nevertheless, on October 14, 1993, Ram was indicted by a Hawaii County grand jury on Z.D.'s uncorroborated allegations that Ram had sexually assaulted Z.D. some twenty months earlier. The charges were dismissed, without any trial, in June, 1994.

In the meantime, on October 22, 1993, Petitioner William Silva, a Hawaii County police lieutenant, and Elsie Kamahele, a CPS supervisor, seized Ram's five adopted sons and one foster son without any indications that those six boys ever had been subjected to and/or threatened with any harm. Silva and Kamahele acted without any court order purportedly on the basis that Ram's indictment eight days earlier – for something that allegedly had occurred to Z.D. in January, 1992 – gave

them a sufficient basis for concern as to the current safety and well-being of Ram's minor children.

On October 26, 1993 the six children were returned to Ram, and this litigation ensued. Although there has not been and never will be any showing that Ram ever sexually abused Z.D. or any of his children (or anyone else, for that matter), Petitioner Silva has contended – thus far unsuccessfully – that for his actions he should be shielded by qualified immunity.

REASONS FOR DENYING THE WRIT

(1) Because Petitioner Silva knew or should have known that his seizure of Ram's children without a prior court order, and in the absence of any evidence that the children were in imminent danger, unreasonably violated even the "amorphous" and/or "nebulous" parameters of the right to family integrity, Silva is not entitled to qualified immunity as a matter of law.

(2) Because of the clear absence of any evidence or indication of imminent harm to Ram's children at the time of their seizure by Petitioner Silva, without a prior court order, this case is clearly distinguishable from and therefore consistent with every other reported case in which child care workers have been afforded the protection of qualified immunity in connection with their reasonable efforts to protect children who are or may be at risk.

(3) The opinion of the court below is in no way "discordant and inconsistent with" this Court's opinion

in *Behrens v. Peletier*, 516 U.S. ___, 116 S.Ct. 834, 113 L.Ed.2d 773 (1996), as alleged but not argued by the Petitioner.

I. QUALIFIED IMMUNITY DOES NOT EXTEND TO STATE OR LOCAL OFFICIALS WHO SEIZE CHILDREN WITHOUT A PRIOR COURT ORDER AND WITHOUT ANY EVIDENCE THAT THE CHILDREN ARE IN IMMINENT DANGER OF HARM.

In *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988), it was undisputed that the father was seen chasing his seven year old daughters with a chain and that severe bruises were found on the children before investigators took them – without a court order – for medical examinations. In *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), a medical doctor's clinical observations concerning recent sexual abuse and additional corroborating evidence from a psychologist tipped the balance against any clearly established constitutional right to the plaintiffs' care and custody of their children, free from interference by the state's child care workers, at the time of the alleged violations.

Finally, in *Foy v. Holston*, 94 F.3d 1528, 1534-1537 (11th Cir. 1996), there was evidence that a teenaged child claimed abuse by her parents, had bruises on her arm, did not wish to return to her family, and threatened suicide if she were compelled to return – all of which strongly indicated that the state child workers were "doing their jobs" in good faith when they placed the girl in foster care. Thus, in all of the cases cited and relied

upon by Petitioner there was abundant evidence that the children faced imminent harm which outweighed the admittedly "general formulation" of the claimed right to family integrity. See, e.g., *Hodorowski v. Ray, supra,* at 1217.

In the instant case there was absolutely no evidence of harm – past, present, or imminently in the future – to the children who were seized by Petitioner Silva. There were only stale allegations of harm to another child (Z.D.), which had been investigated and discarded on at least two prior occasions over a period of some twenty months. And there was an indictment eight days before the seizure which should have been followed immediately by an inquiry or seizure if, indeed, the indictment was a significant event that legitimately gave rise to any renewed concern about the safety and well-being of Ram's children. Unlike *Foy v. Holston, supra,* Petitioner Silva was not even arguably "doing his job" when he seized Ram's children without first seeking a court order under a state procedural statute that clearly was enacted to prevent the kind of abuse of family rights in which Silva deliberately and flagrantly engaged.

The mere fact that the asserted family rights may be somewhat generally defined and determined through a fact-laden balancing process does not entitle Silva to immunity for violating those rights merely by claiming that he was acting in the best interests of the children he seized. No court has ever extended the doctrine of qualified immunity quite that far. Indeed, despite even the most general formulation of rights any assertion of qualified immunity must be supported by sufficient evidence that the offending actions were within the scope of the

official's legitimate duties and concerns. But what competent police officer or child case worker ever reasonably could conclude under these peculiar and unique facts that his or her unilateral decision to seize Jay Ram's children on October 22, 1993, was necessary to protect the children from imminent harm? And what reasonable or competent police officer ever would effect such a seizure in the course and scope of his duties without first seeking the authorization of a judge or magistrate?

II. CONCLUSION

Because the seizure in this case was so outrageous and so clearly without justification it is submitted that any reasonable official balancing the assertion of family rights against the potential for harm to the children would and should have concluded that a seizure without prior court authorization was impermissible – as the respective courts below already have found. Accordingly this is not a case in which either the outcome or the reasoning process conflicts with or in any way is inconsistent with decisions elsewhere, and the Petition for Certiorari therefore lacks merit and should be denied.

DATED: Honolulu, Hawaii, November 24, 1997.

Respectfully submitted,

ERIC A. SEITZ
Attorney for Respondent